No. 689.

In the Supreme Court of the United States

October Term, 1946.

FREEMAN J. THOMSON, Administrator of the Estate of ARTHUR W. THOMSON, Deceased, *Petitioner*,

vs.

CAROLINE THOMSON, *Respondent*.

PETITIONER'S REPLY TO RESPONDENT'S SUGGESTIONS IN OPPOSITION TO WRIT OF CERTIORARI.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

In the Supreme Court of the United States

October Term, 1946.

FREEMAN J. THOMSON, Administrator of the Estate of ARTHUR W. THOMSON, Deceased, *Petitioner,*

vs.

CAROLINE THOMSON, *Respondent.*

APPELLANT'S REPLY TO RESPONDENT'S SUGGESTIONS IN OPPOSITION TO WRIT OF CERTIORARI.

No. 689.

PRELIMINARY STATEMENT.

Respondent's suggestions have necessitated this reply, showing that Exhibits "A," "B" and "C" are parts of the omitted policy of insurance which was before the trial

court but not before the Circuit Court of Appeals, and that said omitted parts contradicted respondent's witnesses.

Exhibit "A."

Exhibit "B."

"If the policy is payable to a revocable beneficiary, loans will be made upon the sole signature of the Insured."

Exhibit "C."

RELEASE OF ASSIGNMENT.

NOTICE

"This release of assignment does not renominate or reinstate any beneficiary or beneficiaries prior to the date of the assignment."

State of Missouri, County of Jackson—ss.

Harvey E. Hartz, of lawful age, being duly sworn, upon his oath states:

That Exhibit "A", hereto attached, is a photostatic copy of the part of the policy consisting of the application referred to in the testimony of the District Manager for the John Hancock Mutual Life Insurance Company.

That Exhibit "B" is a part of said insurance policy with reference to loans.

Exhibit "C" appears on that part of the insurance policy attached thereto and entitled "Release of Assignment."

Harvey E. Hartz

W [illegible] IT

Application for Insurance to the John Hancock Mutual Life Insurance Company of Boston, Massachusetts.

Part A — Statements to Company's Agent 3095799 FORM 100-0-56

99

1. Name of applicant. (Print) ARTHUR - W - THOMSON

2. Address for premium notices. (Print) No. 4000 HOLMES - ST. City or Town K.C. State MO

Present address if different from above. BERKSHIRE HOTEL KC MO

3. Date of birth: Month MAY Day 11 Year 1902 Age and birthday last birthday 57

4. What is your present occupation? State exact duties. SALESMAN

5. Name and address of employer. SELF.

6. (a) Have you ever taken a flight in any type of aircraft either as pilot or passenger? (a) NO

(b) Do you contemplate taking aerial flights either as pilot or passenger? (If either answer is yes, give full particulars on reverse side.) (b) NO

7. Do you intend to reside or travel outside the United States or Canada? If so, state for how long, when, where, and for what purpose. NO

8. Have you ever applied for a policy of life insurance which has not been issued by the said form and amount applied for or upon which an additional premium charge has been imposed by reason of age or otherwise? (If so, state when, where and result.) NO

9. Is this application intended to replace other insurance now in force in this or any other Company? (If so, name Company and give full particulars.) NO

10. Amount of Life Insurance, Disability Benefit, Double Indemnity, and Accident and Health Insurance, in force, pending or contemplated on my life. (Enter amounts in spaces provided.) NO

Name of Company	Life Insurance In Force	Plan	Year Issued	Pending or Contemplated	Total Amount	In Force	Pending or Contemplated
NONE					Monthly Income Disability Benefit		
					Waiver of Premium Only Disability Benefit		
					Double Indemnity in connection with Life Insurance	NONE	
					Double Income Accident and Health Insurance		

11. Form of policy applied for: 20 YR. ENDW.

12. Amount: $20,000

13. Do you desire Total and Permanent Disability Benefit providing for Waiver of Premium? YES

14. Do you desire Double Indemnity Benefit? YES

15. Do you desire Supplementary Provision for Family Income? If answered yes, state how many ..... years. (Insert 10, 15 or 20) NO

16. Premiums to be paid: Annually / Semi-Annually / Quarterly. Total Amount of Premium: $1049.80

17. Have you paid (Yes or No) the premium? NO. Amount paid: $ NONE

18. Dividends to be applied under Option (Here whether (A) to cash, (B) to reduce current premium, (C) left on deposit or (D) to purchase paid-up additions.) NOTE: Option D not applicable to Term Policies.

19. State whether Married, Single, Widow, Widower. MARRIED

20. Non-forfeiture Provisions to become effective in event of non-payment of premium. (Strike out provision not desired.) Extended Term Insurance. Reduced Paid-Up Insurance.

21. Name of beneficiary. (Print) CAROLINE - THOMSON

22. Its Relationship to applicant. WIFE Age 28

23. Do you reserve the right to change the beneficiary from time to time? YES

It is agreed that, unless otherwise provided, any policy issued hereunder shall be payable to the executors or administrators of the insured, if no insured beneficiary is living at insured's death, or if payable to a certain beneficiary, that the Company shall not be liable for the application of the proceeds by such beneficiary, or for insured by any legal means, and that the applicant reserves and may exercise all rights and powers under the policy without notice to or consent of such revocable beneficiary, except as otherwise provided.

Home Office Endorsements (Not to be filled in by Agent)

Dues 11 to end option C

I (We) hereby apply for the insurance described above and agree: A. That the foregoing statements and answers which I have made, and which with Part B of this application shall form the basis of the contract of insurance, are complete, true and correctly recorded. B. That if payment of the premium above stated has been made with this application, the insurance hereby applied for shall be subject to the terms and conditions of any policy issued hereunder; if the application is approved at the Home Office of the Company, shall be in force from the date of the completion of Part B of this application, provided, that the Company shall be entitled that on said date I was insurable in accordance with its rules for the amount and plan of insurance applied for without any medical examination; that if payment of the premium has not been made with this application, any policy which may be issued hereon shall take effect only if and when delivered or have mailed by a physician since the date of Part B, and then only in the event that it shall be delivered to and actually received by me, [illegible] of health and habits since the date of Part B, and that whether the premium is paid with the application or otherwise, the insurance hereby applied for shall be subject to the terms and conditions of the policy and of all its conditions. C. That a receipt on the form attached hereto is the only receipt the agent is authorized to give for any payment made before delivery of the policy; that only the President, a Vice President, the Secretary or an Assistant Secretary can make, modify or discharge any of the Company's rights or requirements, that notice to or knowledge of the soliciting agent or the medical examiner or any other person, except as specifically provided herein as to or knowledge of the Company and that neither such agent or medical examiner is authorized to accept risks or to pass upon insurability. D. That the foregoing statements are covenants by the Company in this application, the Company is authorized to amend this application by making the change in the [illegible] and I hereby agree that any acceptance of any premium hereof on this application as amended shall constitute a ratification of such amendments, but no change shall be made as to amount, classification, plan of insurance, or benefits unless agreed to in writing by me. E. [illegible] the date of this application, it is not approved as aforesaid, or if the Company does not give notice of action thereon, the application shall be

Dated at Mo. A Thomson x Arthur W Thomson

Applicant's Signature

[illegible]

Subscribed in my presence and sworn to before me this 29th day of November, 1946.

Thos. M. Dant.

Notary Public, Jackson County, Missouri.

My commission expires March 13, 1948

I.

On pages 3 and 4 of respondent's suggestions the claim is that while the policy was attached as an exhibit to the interpleader's petition, it is no part of the record; that it was never formally introduced as an exhibit by either party and then the mistaken stipulation appearing at pages 6-7 of the petition for certiorari is again reproduced on the erroneous theory that parties by stipulation may confer a jurisdiction which the law denies. The record contradicts said erroneous claim (34, 35, 36). It contains the following:

"Mr. Hartz: I presumed you would introduce the policy in evidence.

The Court: The policy is a part of the petition and made a part of it as an exhibit (34).

* * * * * *

Mr. Hartz: Then, if Your Honor please, the policy is, I presume, in evidence, it is a part of the petition and will be considered in evidence (35).

The Court: It will be so considered (36).

Mr. Hartz: Yes. Then under the policy and under this designation of beneficiary the estate is designated as the beneficiary for this money. Now, she is claiming this, regardless of this designation, and in my opinion she should proceed with her testimony, because under the policy we are entitled to it, the face of the policy, we are entitled to this money." (36.)

Thus the policy (with its attached papers) was not only formally but substantially introduced in evidence and fully considered by the trial court in connection with the oral evidence contradicted by it. Furthermore, Rule 10 of the Federal Rules of Civil Procedure provides:

> "A copy of any written instrument which is an exhibit to a pleading *is a part thereof for all purposes.*"

See also official form 3, definitely confirming that statement. So that the policy was duly introduced in evidence and was part of the record.

The district manager of the John Hancock Life Insurance Company testified in great detail on October 24, 1945, as to the alleged conversations had on May 24, 1938, about seven and one-half years before (126). That conversation was the only basis for the finding by the Circuit Court of Appeals set forth in its opinion (126) that

> "His (deceased's) net income was approximately $15,000.00."

and the principal basis for the decision of the Court of Appeals.

But the application attached to the policy and part thereof offered in evidence discredits the evidence of Mr. Niman.

Mr. Niman's evidence on that subject is (65):

> "I then asked him the questions on the applications and one of the questions was 'What is the estimated annual income or net worth of the applicant?' I told him I had to answer that question, would he supply the answer; he said, 'Oh, $15,000.00 or in excess thereof, a year.' I noted that on the application, concluded the sale." (65.)

Exhibit "A," the photostatic copy of the application attached to and made part of the policy, directly contradicts the witness, for it contains no such statement. Thus the witness was discredited in the trial court. The parts of the policy dealing with "loans" marked Exhibit "B" provides:

> "If the policy is payable to a revocable beneficiary, loans will be made on the sole signature of the Insured."

The law of Missouri authorizes the insured to change the beneficiary where he reserves the right so to do without the consent of the beneficiary.

The first Missouri Supreme case referred to in the opinion of the Court of Appeals on page 132 of the record is *Fendle* v. *Ray*, (Mo.) 58 S. W. (2d) 459. It says, l. c. 464:

> "* * * if the right to change the beneficiary is reserved in the policy, the insured may make the change without the consent of the beneficiary (*Robinson* v. *Ins. Co.*, 168 Mo. App. 259) * * *"

The wealth of State and Federal cases there cited on the point demonstrates that the manager knew that it was not necessary to have the beneficiary's consent to the change, and that fact discredited the district manager as a witness in the trial court.

Another part of the policy entitled "Release of Assignment," under the heading "Notice" contained the following legend:

> "This release of assignment does not renominate or reinstate any beneficiary or beneficiaries nominated prior to the date of the assignment."

The Circuit Court of Appeals, l. c. 133-134, not having the benefit of said provision, likened the policy in this case to a deed given to secure a loan upon the theory that it was really a mortgage.

Had said statement as a part of the policy been included in the record, the Court of Appeals could hardly have come to the conclusion that it was proper to treat the policy under the evidence on the same theory that a deed given to secure a loan is construed by a court of equity.

It is true that the parts of the policy not included in the record are referred to herein only because they are verified copies of parts of the policy so offered in evidence and made part of the record only for the purpose of demonstrating the wisdom of the rule that requires an appellant in an equity case who would have the court try the case *de novo*, to include all the evidence before the trial chancellor in the record if he would have the circuit court of appeals try the case *de novo*.

The question here involved is simply a question of jurisdiction which could not have been conferred on the Court of Appeals by stipulation.

Respondent claims that (2):

> "* * * the chief complaint is a criticism of the conclusions reached by the court *upon the evidence in the case* * * *"

The trouble with that contention is that petitioner's complaint is that the Circuit Court of Appeals reached its conclusions on the *part of the evidence* respondent chose to include in the record contrary to the conclusions reached by the trial court upon *all the evidence in the case*—both including *that which was not before the Court of Appeals* and that which was.

The claim that the policy was not the basis of the judgment, even if sustained, did not relieve respondent of the burden of including the policy in the record, or give the Appellate Court jurisdiction to try the case *de novo*, since the witnesses testified with reference thereto, and were contradicted thereby, and the face of the record establishes its omission therefrom and the lack of jurisdiction to try the case *de novo*.

II.

An appellate court in England, Missouri, or the Federal Courts, cannot and never could try an equity case *de novo* on appeal unless the same evidence be before the appellate court which was before the trial court. And so the judgment of the Circuit Court of Appeals is void for lack of jurisdiction, which could not be conferred by consent.

This Court, in *Atlas Life Ins. Co.* v. *Southern Co.*, 306 U. S. 565; *Sprague* v. *Ticonic Bank*, 307 U. S. 161; *Henrietta Wells* v. *Rutherford County*, 281 U. S. 121, and *Waterman* v. *Canal-Louisiana Bank & T. Co.*, 215 U. S. 33, l. c. 43, points out that, in this sort of case, the jurisdiction and practice of the Federal Courts is like that of the "High Court of Chancery in England at the time of the adoption of the judiciary act of 1789." The practice in that High Court, on the identical point here involved, is shown by the opinion in *Sir John Eden, Bart., et al.* v. *The Right Honorable John Earl of Bute et al.*, VII Brown's Parliamentary Cases 204, 208. The opinion says:

> "The cause being at issue, witnesses were examined on both sides, and on the 9th of December, 1773, the cause was heard before the Lord Chancellor Bathurst;"

The case was then referred to a Master to approve a lease, pursuant to the agreement with usual covenants.

"Soon after pronouncing this decree, the respondents preferred a petition to the Lord Chancellor, stating, that they had several proofs taken in the cause, and several exhibits to be read, which they found by the Register's minutes were not entered as read; and that there was no direction given for entering the proofs and exhibit as read, which they were advised was very material to be done."

* * * * * * *

"On the 21st of January, 1774, this petition came on to be heard, when his Lordship was pleased to order, that the evidence on both sides should be entered as read; and that the minutes should be rectified, according to the prayer of the petition." (l. c. 205.)

* * * * * * *

"From so much of this order, as directed the evidence to be entered as read, the present appeal was brought; and on behalf of the appellants it was argued, that the decree on the hearing of the cause, was the judgment of the Court on the construction of the agreement; and that the agreement itself, with such part of the evidence as had been read by the plaintiff, was all that was then before the Court. That no evidence was at that time offered on the part of the respondents, in support of the construction which they contended for; and if any had been offered it would have been objected to, great part of it being totally inadmissible. That the purport and nature of the evidence, was not on the hearing of the cause, or on the respondents petition, either read or stated to the Court. That upon the hearing of all appeals from an inferior to a superior Court this principle universally prevails, that no evidence can be received which was not laid before the Court below; *nor can any evidence which was received*

below, be objected to above, **unless the admission of improper evidence be among the points of the appeal: For if it were otherwise, the superior Court, instead of determining on the rectitude of the decree appealed from, would be exercising an *original,* not an *appellate* jurisdiction; and might appear to be imputing errors to the Court below, where there was no pretence that any had been committed. It is not indeed unusual to rectify minutes, taken at the time of pronouncing a decree, where something which realy passed, and ought to have been entered, has by mistake been omitted. But the objection in the present case was, that the order, though founded on a petition to rectify the minutes, applied to a point in which the minutes were not wrong, but clearly right; and the entering this evidence as read, was not conformable to, but *directly against the truth of the case.* There may have been instances, where, with a view to save time, evidence *which has been stated on one side, admitted on the other, and judged of by the Court,* has been entered as read, though it was not actually read at the hearing; but an order to enter evidence as read, which was not read, nor at all in the consideration of the Court, at the time of pronouncing the decree, was conceived to be without precedent. And if, on the hearing the appeal in this cause from the Lord Chancellor's decree, the evidence on both sides was to be gone into, a case would be laid before the House, totally different from that which was before his Lordship."**

The other side admitted that:

"The parol evidence had not been read, because the opinion of the Court in the respondents favour, was given upon the argument itself; it was therefore unnecessary to read proofs in confirmation of that opinion." (l. c. 207.)

The High Court of Parliament sustained said contention and

> "* * * it was ordered and adjudged, that the order complained of, so far as it directed the evidence on both sides to be entered as read, should be reversed." (l. c. 207-208.)

That rule thus formulated has been followed by the Federal Courts throughout the years. It establishes lack of jurisdiction by the Circuit Court of Appeals to try the case *de novo*, or to do otherwise than to affirm the decree of the District Court. It has been applied by this Court and by the Missouri courts.

The Missouri courts (*St. Louis County* v. *Sparks*, 11 Mo. 201, l. c. 203) follow the rule applied in *Eden* v. *Bute*, *supra*, stating that rule as it is set forth in said case and in the Federal Courts. Thus:

> "The section of the statute which is relied on to sustain this appeal from the County to the Circuit Court, confers appellate jurisdiction only. Such jurisdiction does not impart a right to try the case anew, or on any other evidence than that which was before the court below. Otherwise, the jurisdiction would not be appellate, but original." Citing *Eden* v. *Bute*.

To the same effect see *Maplegreen Co.* v. *Trust Co.*, 237 Mo. 350, and *Maplegreen Realty Co.* v. *Trust Co.*, 237 Mo. 365, in which cases the court held that the parties could not, by agreement, give the appellate court jurisdiction to try the case *de novo* without bringing the evidence before the trial court into the record on appeal.

The rule authorizing designation by each party as to the part of the record to be sent to the Appellate Court made the stipulation superfluous and unnecessary.

The unnecessary stipulation warrants the application of the maxim "*Clausulae inconsuetae semper inducunt suspicionem*" and "is itself a badge of fraud." (*Baldwin* v. *Whitcomb*, 71 Mo. 659.)

It evidently imposed on the Court of Appeals, and hence its judgment cannot stand (*Hazel Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238).

An appeal in an equity case does not vacate the decree (*Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185), nor give the Appellate Court the same jurisdiction to try a case *de novo*, as in an admiralty case (*Irvine* v. *The Hesper*, 122 U. S. 256).

Had the case been tried by the trial judge when he was a state judge at the court house three blocks away, his judgment could not be disturbed on appeal unless the respondent took the entire record to the highest court of the state.

Does not the decision of the Circuit Court of Appeals conflict with the decision of this Court in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, since this was a diversity case wherein the decision in the state court three blocks away would have been final under the facts in this record?

Since the Court of Appeals was without jurisdiction to do otherwise than affirm the judgment of the District Court, the writ should be granted.

Respectfully submitted,

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.